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JOHN T. PEY, Cl

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 591

E. A. TALIAFERRO, doing business under the name and style of Davis Auto Exchange,

Petitioner,

vs.

THE INSURANCE COMMISSION OF THE STATE OF CALIFORNIA, et al.,

Respondents.

On Petition for Writ of Certiorari to the District Court of Appeal, First Appellate District, Division One, State of California.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The opinion is reported in 142 Advance California Appellate 553. California Supreme Court hearing was denied August 21, 1956; consequently the opinion became final August 24, 1956. It is also reported in 298 Pacific 2d 914.

JURISDICTION.

Apparently the petition attempts to state a ground for issuance of the writ under the due process and equal protection clauses of the Constitution of the United States (Petition, pages 2-3). As we point out in argument below, no such ground is stated.

STATUTES INVOLVED.

The statutes involved are printed in the Appendix to this brief.

STATEMENT.

1. Petitioner conducted an auto parts sales business. From October 1, 1950 to October 1, 1951, his liability under the workmen's compensation law of the State of California was insured with Industrial Indemnity Company (Petition, page 4, lines 3-25).

2. Premiums on the policy were controlled by the provisions of the "California Workmen's Compensation Insurance Manual, 1950," promulgated by the California Insurance Commissioner under authority of article 2, chapter 3, part 3, division 2, California Insurance Code[1] (Petition, page 4, line 25 to page 5, line 5).

3. Petitioner made quarterly reports of payroll as required by the policy, remitted premium pursuant to

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[1]Cal. Ins. Code, Sections 11730-11742, printed in Appendix to this brief.

billings based on those reports (Petition, page 5, lines 5-20).

4. About eight months after the close of the policy period, a "test audit" of petitioner's books relating to the insurance was made by an auditor of California Inspection Rating Bureau (Petition, page 5, lines 20-30).[2] The test auditor reclassified petitioner's employees to higher premium cost classifications (Petition, page 5, line 30 to page 6, line 15).

5. Petitioner requested the Bureau to review the test audit. The Bureau held a hearing thereon and sustained the test audit (Petition, page 9, lines 10-22).[3]

6. Petitioner took an appeal to the Insurance Commissioner who, after hearing, partially sustained the Bureau, partially reversed it respecting the test audit reclassifications[3] (Petition, page 9, line 30 to page 10, line 20; page 11, lines 7-23).

7. Petitioner brought a proceeding in the Superior Court under California Code of Civil Procedure section 1094.5[4] to annul the portion of the Commissioner's order adverse to petitioner (Petition, page 19, lines 10-17). The petition filed in that proceeding alleged (a) that the Commissioner's findings and order were unsupported by the evidence and contrary to law (Petition, page 9, lines 17-23) and (b)

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[2]Cal. Ins. Code, Section 11750.3, printed in Appendix to this brief.

[3]Ins. Code, Section 11753.1, also printed in Appendix to this brief.

[4]Also printed in Appendix to this brief.

that the hearing officer who presided over the hearing before the Insurance Commissioner was not qualified under section 11502[5] of the Government Code of the State of California (Petition, page 19, lines 23-27). A motion to strike the allegations referring to section 11502 was granted (Petition, page 20, lines 7-9). Thereafter the Superior Court tried the matter on the record of the proceedings before the Insurance Commissioner and denied relief to the petitioner (Petition, page 20, lines 17-19).

8. Petitioner appealed to the District Court of Appeal of the First District of the State of California, the opinion of which is set forth as pages 1 to 8 of the exhibit to the instant petition for writ of certiorari. Petition to that Court for rehearing and to the California Supreme Court for a hearing were denied (Petition, page 20, lines 20-32), and the decision is now final as to the California Courts.

QUESTION PRESENTED.

The only *Federal* question presented is whether substantial evidence supports the Court's decision, i.e., whether substantive due process was given petitioner. The procedural question purportedly raised by the petition is whether the California Court's interpretation of the requirements of sections 11500-11528, Government Code of that State, is correct. No specification of any prejudice to petitioner by viola-

[5]Printed in Appendix.

tion of procedural due process requirement is set forth in the petition (Petition, pages 30-37). Consequently, no Federal question as to procedural due process is presented (*Jacobson v. Massachusetts,* 197 U.S. 11, 36-37, 39; *Detroit, etc. Ry. v. Osborn,* 189 U.S. 383, 390-391), there being no constitutional right to a particular form of remedy (*Neblett v. Carpenter,* 305 U.S. 297, 305; *Gibbes v. Zimmerman,* 290 U.S. 326, 332).

ARGUMENT.

Substantial evidence supports the decision.

(a) Petitioner attacks the Court's acceptance of the test auditor's testimony that interchange of labor occurred and that respondents failed to produce adequate payroll records (Petition, page 6, line 12 to page 9, line 9). We here quote from respondents' brief before the District Court of Appeal on that point (references to "Tr." are to the page and line of the transcript of the proceedings before the Insurance Commissioner, a part of the record filed with the petition for writ of certiorari):

> "In this connection, Hesseltine, the test auditor, testified that after Exhibit 27 (TR. p. 157, line 19 to p. 158, line 5), a letter to appellant from the test audit department of the Inspection Rating Bureau, dated April 7, 1952, had been sent to appellant, that a reply was received from Mr. Truman, and that he went to appellant's place of business and discussed the records and business with him and started his audit. Hessel-

tine stated that he asked Mr. Truman for the necessary employees' payroll records, which would detail the work of the employees sufficiently to enable proper classification of their work to be made; that Mr. Truman had nothing but reports to the State Unemployment Commission and some individual time sheets, but not time sheets for all the employees (TR. p. 91, line 11 to p. 92, line 21; p. 97, line 22 to p. 98, line 3). That after he commenced his audit, working with Mr. Truman, the appellant, Taliaferro, appeared at the premises and that he discussed the classification of the work with the latter and Mr. Truman; and made up an audit (TR. p. 91, line 22 to p. 93, line 13; on cross-examination, TR. p. 108, line 32 to p. 109, line 2.) The appellant, on the other hand, said that he showed payroll records including segregation of payroll, but again said that Hesseltine did not talk to him except to greet him and that the rest of the discussion was with Truman (TR. p. 147, lines 7-25). However, the Commissioner's deputy questioned him further and he stated that Hesseltine did not question him about the operation of his business; that all he and Hesseltine did at the time of this test audit interview was to pass the time of day (TR. p. 164, line 23 to p. 165, line 3). But when he retailed the conversation in more detail he *admitted that he referred Hesseltine to Truman for information both as to the auditing and as to his records* (TR. p. 165, lines 9-21). Truman, on the other hand, testified that he had not been *employed* by Mr. Taliaferro during the policy period, and that he had not referred to anything that had happened during that period (TR. p. 162, line 17 to p. 163, line 15), and on cross-

examination, Truman testified that he was not particularly familiar with the operations of the Davis Auto Exchange (appellant's business) during the years 1950 and 1951 (TR. p. 163, lines 19-21), but upon further questioning he admitted that he was attorney for appellant during that period (TR. p. 163, line 24 to p. 164, line 3); that he was present and was interviewed by the test auditor at the time of the test audit concerning the operation of the business (TR. p. 164, lines 4-13).

We thus have somewhat remarkable testimony by appellant and his employee, Mr. Truman, that when the test auditor appeared and requested information for audit purposes concerning his insurance, the appellant referred him to appellant's employee, who didn't know anything about the operations covered by the audit period, and that the latter gave the auditor no information. A better corroboration of Hesseltine's testimony would be hard to find—which was that the payroll records were asked for and not submitted to him at the time of the audit—since appellant, when asked for the records referred the man to Truman and Truman merely testified that he hadn't told him anything about the business. Under the circumstances, of course, in view of the rule concerning maintenance of payroll records, the insured was under a duty to produce the records for examination by the test auditor. Truman did not testify that he had produced them and Taliaferro admitted that they had been asked for and that he had referred the matter to Truman, consequently there is no denial at all of Hesseltine's testimony that he asked for the payroll records

and could not get them." (Brief of Resp., pp. 20-22.)

(b) Petitioner next attacks the Bureau's decision (Petition, page 9, lines 9-30). On this point we refer to the quoted portion from page 24 of respondents' brief, referring to the Bureau hearing, under paragraph (d) below.

(c) Petitioner next contends that there was no substantial evidence of interchange of labor, upon which the reclassification was partially based (Petition, page 10, line 3 to page 11, line 7). This also was covered before the California Courts:

> "Hesseltine, the test auditor from the California Inspection Rating Bureau, testified at the hearing. This testimony was to the effect that while there he saw a clerk make sales over the counter in the store, he saw a clerk take a man out into the yard and show him around where some used parts were stocked; that he saw that the used parts were stored in the yard behind the store; that Truman and appellant's brother Dave told him that such free interchange existed:
>
> '* * * that there was interchange between these parts—the new parts house and the old parts house, depending on how rushed you were in various areas, that one man would go to one place and work if he was needed,—if he wasn't needed there, he would go back to the other place of business, that being complete interchange of labor, it is assumed to be the highest class. To go on, in the interchange between your dismantling yard and your parts house, I

believe that this was from Mr. Truman—and your brother Dave—stated that all employees, all mail [sic] employees, at their leisure, would assist at one time or another in dismantling work. In other words, that was basically your entire operation—was that that it was based on the fact that you didn't have enough work to keep one man business [sic] in one particular operation, occupation, all the time, that it was a matter of peak periods where one man could be best transferred from one type of work to another. If they were sitting around doing nothing, they were sent out to help in the parts, as a regular practice' (TR. p. 136, line 7 to p. 140, line 23)." (Brief of Resp. p. 16.)

"We have not, so far, commented upon that part of the Commissioner's finding VIII which specified that dismantling of automobiles was conducted as part of the operations in this case. It seems unnecessary to point to evidence, since appellant asserts that he conducted a separate dismantling operation (App. Op. Br. p. 6, lines 19-21); but, nevertheless, there are in evidence reports of injuries under the compensation policy to an employee engaged in burning (Exhibit 29-B, employee Jack Arnold); and another employee whose occupation is given as Janitor is reported as having been treated for injury received while taking pins out of pistons (Exhibit 28, employee Maurice Hamilton).

See, also Taliaferro's testimony that a salesman was injured grinding a shaft (TR. p. 44, line 2 to p. 45, line 12), and another salesman fitted wristpins, faced valves (TR. p. 46, lines 9-22)." (Brief of Resp., pp. 18-19.)

(d) And Petitioner finally contends that there was no substantial evidence that he failed to produce sufficient payroll records for classification purposes (Petition, page 11, line 7 to page 19, line 9). Under (a) of this argument, *supra,* we have covered the failure to produce adequate time sheets for the test auditor. Likewise, the other occasions of petitioner's failure to produce adequate records were developed before the California Court:

> "**The evidence supports the Commissioner's Finding of Fact No. IX(2), that the payroll records were not produced when the company auditor requested the records so that he could check his audit with the test audit.**
>
> Orville Jones testified that he was the Industrial Indemnity Co. auditor, that on receipt of a copy of Hesseltine's test audit he made two appointments to see appellant Taliaferro; that the second time he was at the premises Taliaferro called in and he talked to Taliaferro on the telephone. This was in August of 1952. Truman would not show him the appellant's records unless Taliaferro was present—that is, Jones did ask for the records. Shortly thereafter, Jones went into the Navy and consequently had no further connection with the matter (TR. p. 148, line 13 to p. 151, line 5). As pointed out above, when the test auditor Hesseltine had asked for the records, Taliaferro, according to his own testimony, had referred him to Truman." (Brief of Resp. p. 23.)

"The evidence supports the Commissioner's Finding of Fact No. IX(3), that appellant failed to produce adequate payroll records on request by the manager of the company's payroll audit bureau.

Neely, payroll audit manager for the Industrial Indemnity Co., mailed a copy of the test audit with a letter dated September 4, 1952 (Ex. 30 in evidence) to appellant Taliaferro. (TR. p. 86, line 13 to p. 87, line 16.) Examination of the letter shows that this gave Taliaferro very full information on the classifications involved.

After fifteen days, in accordance with the terms of the letter, not having heard from Taliaferro, Neely billed him on the basis of the test audit, stating in his letter that he had no alternative to such action as he had received no reply to his letter. (TR. p. 88, line 21 to p. 89, line 20; p. 151, line 15 to p. 152, line 5.)" (Brief of Resp. pp. 23-24.)

"The evidence supports the Commissioner's Finding of Fact No. IX(4), that appellant failed to produce complete and adequate payroll records at the bureau hearing.

O'Brien, manager of the Inspection Rating Bureau, testified that he was present at the hearing before the Inspection Rating Bureau on or about March 10, 1953; that appellant was given opportunities to submit evidence proving that the test audit was wrong and submitted none; that Exhibit 3 in the record is a copy of the minutes of the Bureau. (TR. p. 152, line 10 to p. 157, line 15.) Again, it should be noted that the minutes of the Bureau (which are attached to Exhibit 3 in evidence) make clear that the subject of payroll segregation did come up and this was also Taliaferro's testimony (TR. p. 30, lines 1-7) and

his brief herein so states (Ap. Op. Br. p. 4, line 12 to p. 5, line 17)." (Brief of Resp. p. 24.)

"The evidence supports the Commissioner's Findings of Fact Nos. IX(5)(6), that appellant failed to produce proper payroll records at the request of the bureau's attorney or at the hearing before the Commissioner.

The subpoena issued calls for production of payroll records. (Exhibits 11, 16, 17.) Appellant brought in a number of records. (Exhibits 33 to 35 for identification only.) These were not admitted into evidence because of their obvious irrelevance, since none of them deal with activities and duties of the employees in any detail. None of them are time sheets showing the amount of time devoted by employees to certain activities, and appellant testified that he brought in all the records that he could. (TR. p. 31, lines 7-10; p. 31, line 12 to p. 35, line 4.) He testified that he did have the men make up time sheets (TR. p. 48, line 17 to p. 49, line 13); he did not know what had happened to them—he destroyed some; filed others. He had made a search but could not find them. (TR. p. 49, line 14 to p. 50, line 19; p. 75, lines 3-6; p. 77, lines 4-20.) He did not remember whether the test auditor had asked for time sheet records. He had had Truman make a search. (TR. p. 77, line 21 to p. 78, line 12.)" (Brief of Resp. pp. 24-25.)

CONCLUSION.

Petitioner fails to state a Federal question. His disagreement with the California Court's interpretation of California's Administrative Procedure Act, in the absence of an allegation of specific prejudice, is without Federal significance. The order of which he complains, likewise being supported by findings based on substantial evidence, contains no basis for Federal consideration. Consequently, this Court should not disturb the resulting judgment.

Dated, San Francisco, California,
December 10, 1956.

Respectfully submitted,

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(Appendix Follows.)